IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD J. SREIN and R.J. SREIN CORP., Plaintiffs, v. FRANKFORD TRUST COMPANY (NOW KNOWN AS KEY TRUST COMPANY) Defendant.	:	CIVIL ACTION NO. 99-2652

MEMORANDUM

ROBERT F. KELLY, Sr. J. NOVEMBER 29, 2001

This lawsuit involved two claims by Plaintiffs, Ronald J. Srein ("Srein"), individually, and R.J. Srein Corporation ("Srein Corp."), against the Defendant, Frankford Trust Company ("Frankford"). The first claim alleged negligence on the part of Frankford regarding its handling of Plaintiffs' investments in retirement plans which Frankford held as trustee. The second claim alleged violation of fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., regarding Frankford's handling of the same. Prior to the start of trial, this Court determined that Plaintiffs were entitled to a jury trial on the negligence claim, but not on the ERISA claim, however, the Court decided that it would try the ERISA claim to an advisory jury. On the negligence claim, the jury determined that the causal negligence attributable to the Plaintiffs was seventy percent, and, therefore, the Plaintiffs were precluded from recovering any damages. On the ERISA claim, the jury determined, and this

Court agreed with the conclusion, that Frankford was not an ERISA fiduciary and, therefore, was not liable to Plaintiffs. Defendant has moved for an award of attorney's fees and expenses pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). For the reasons stated below, Defendant's motion will be denied.

I. BACKGROUND

The present action originated from prior litigation in which both the Plaintiffs and the Defendant in this action successfully sued third parties. In 1990, Srein, a successful businessperson and a sophisticated investor, was introduced to viatical investments, and in the early 1990's, he invested in numerous participation agreements on life insurance policies through American Life Resources Corporation ("ALRC"), a viatical settlement company.[1] At ALRC, Srein dealt primarily with Craig Silverman ("Silverman"), a principal of ALRC. In 1992, Silverman parted ways with ALRC and formed his own viatical settlement company called FINDCO, Inc. ("FINDCO"). Srein decided to continue to deal with Silverman and transferred his business to the new entity FINDCO. In September and October of 1992 and April of 1993, Srein individually entered into six (6) participation agreements with FINDCO. The procedures followed by FINDCO were the same as those that had been used by ALRC, in fact, FINDCO used the same forms and the same escrow agent as ALRC.

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[1] In viatical investing, an investor purchases the death benefit of a life insurance policy issued to an individual diagnosed with a fatal disease. These investments are made through a viatical settlement company which locates insured individuals who are interested in obtaining an immediate payment of part of the face value of their insurance policy in exchange for assigning all or part of the life insurance policy. This enables the insured to obtain money which would otherwise be unavailable until after death. Then, when the insured passes away, the viatical settlement company collects the policy proceeds, pays the investor the money he advanced under the agreement and the remaining balance is divided between the investor and the settlement company in accordance with their agreement.

In early 1993, Srein, who was the sole stockholder and only employee of his company, Srein Corp., wanted to invest his retirement plans in viatical investments. However, the present trustee of his retirement plans would not allow such investments as such investments are not registered. Silverman recommended to Srein that he transfer his retirement plans to Frankford since Frankford did not prohibit acting as trustee for viatical interments. Laraine Daly ("Daly"), a trust officer at Frankford, facilitated setting up qualified ERISA plans for Srein Corp. at Frankford and transferring the assets from Srein's former trustee to Frankford. In February 1993, Frankford and the Srein Corp. entered into various agreements for the purpose of setting up a trusteeship for the Srein Corp. retirement plans ("Srein Plan"). According to the Srein Plan, the role of Frankford was of a limited nature as Frankford was to exercise no investment discretion, and Srein was solely responsible for selecting the investments for the plans. Frankford only retained the authority to refuse to accept investments which would violate the provisions of ERISA. Other than the relationship with Srein Corp., Frankford had no direct contractual relationship with Srein individually, i.e. Srein maintained no personal account at Frankford.

Once Daly had established the Srein Plan at Frankford, at Srein's request, Daly wired funds from the Plan to facilitate the purchase of an existing life insurance policy on Errol Chamness ("Chamness Policy"). No representative of Frankford played any role in the negotiations by and between Srein Corp. and FINDCO and/or between FINDCO and Mr. Chamness relating to the underlying terms of the investment. Then, two weeks after selling a one hundred percent interest in the Chamness Policy to Srein Corp., FINDCO and Silverman purported to sell the same policy, the Chamness Policy, to another investor.

On June 3, 1993, Frankford, as trustee for the Srein Plan, entered into a

participation agreement with FINDCO to purchase a one hundred percent interest in an insurance policy on the life of J. Lloyd Madsen ("Madsen Policy"). Daly executed the participation agreement on the Madsen Policy for Frankford as trustee for the Srein Plan, and Srein executed the agreement on behalf of the Srein Corp. In order to fund the transaction, Frankford executed the checks for the purchase of the Madsen participation agreement. Again, no representative of Frankford played any role in the negotiations by and between Srein Corp. and FINDCO and/or between FINDCO and Mr. Madsen relating to the underlying terms of the investment.

On October 28, 1994, Frankford entered into a participation agreement on behalf of Stephen Matt Richards[2] ("Richards") to purchase a twenty-eight percent interest in the Madsen Policy, the same underlying Madsen Policy that was the subject of the participation agreement in the Srein Plan. Daly was a signatory on behalf of Frankford as trustee for the Richards' retirement plan. Thus, Daly was the trust officer both for the Srein Plan and the Richards retirement plan, and she signed on behalf of each to purchase two participation agreements based on the same insurance policy, the Madsen Policy. Since Srein had already purchased a one-hundred percent interest in the Madsen Policy approximately a year and a half earlier, there was obviously no percentage left in the Madsen Policy for anyone else to legitimately invest. Although Frankford had in its possession the participation agreements for the Madsen Policy on behalf of both the Srein Plan and the Richards retirement plan, due to the year and a half separation between the two purchases of the same policy, neither Daly nor anyone else at Frankford recognized the overlap in the two transactions or that both participation agreements were based on the same policy. Further, because the participation agreements were not

[2] Richards was also a client of FINDCO and Silverman.

registered investments, they did not have pre-existing numbers assigned to them. Therefore, Frankford had assigned arbitrary, random numbers to the participation agreements held in the retirement plans, including the agreements on the Madsen and Chamness Policies. Since the double sale of the Madsen Policy was not noticed by Daly or anyone else at Frankford, Srein was not notified.

On May 29, 1995, J. Lloyd Madsen died. FINDCO did not notify Srein or Srein Corp. that Mr. Madsen had died. On June 26, 1995, Silverman sent a check to Frankford in the amount of $27,499.86, identified as the Richards retirement plan's percentage of the death benefit for the Madsen Policy. Frankford received the payment of the Madsen Policy proceeds and paid it out to Richards. Since Frankford did not recognize that these proceeds related to the same Madsen Policy in which the Srein Corp. retirement plan had taken a one hundred percent interest, Srein was not notified that Mr. Madsen had died or that Richards had received the Madsen Policy proceeds. On August 31, 1994, Mr. Chamness died. FINDCO did not notify Srein, Srein Corp. or Frankford that Mr. Chamness had died. The proceeds on the Chamness policy were paid to D.P. Partnership on December 15, 1994.

It was not until 1998 that Srein became suspicious of Silverman and FINDCO. Since Srein had not checked on the status of his investments with FINDCO for about five years and did not himself have a list of the viatical insurance contracts, Srein attempted to contact Silverman in order to obtain this information, however, no response was given. Srein later found out that the Madsen Policy and Chamness Policy had been double sold. Frankford and Daly were then notified about the double sale of the policies in March of 1998 when Srein's attorney sent correspondence to Daly.

II. DISCUSSION

Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1)[3], provides that "the court in its discretion may allow reasonable attorney's fee and costs of action to either party" but does not automatically mandate an award to a prevailing party. Monkelis v. Mobay Chemical 827 F.2d 935, 936 (3d Cir. 1987). Defendant has moved for attorney's fees and expenses pursuant to ERISA § 502(g)(1). Although the statute provides no standard for a fee award, to guide district courts as they exercise their discretion in connection with such fee applications, the Third Circuit has set forth five factors that must be considered:

> (1) the offending parties' culpability or bad faith;
> (2) the ability of the offending parties to satisfy an award of attorneys' fees;
> (3) the deterrent effect of an award of attorneys' fees against the offending parties;
> (4) the benefit conferred on members of the pension plan as a whole; and
> (5) the relative merits of the parties' position.

Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). In addition, the Third Circuit has directed that a district court, when ruling on an application for an attorney's fees in an ERISA case, should articulate its analysis and conclusions as it considers each of the five Ursic factors. Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1012 (3d Cir. 1992). Under certain

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[3] 29 U.S.C. § 1132(g)(1) provides:

> (g) Attorney's fees and costs; awards in actions involving delinquent contributions
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

circumstances, courts have awarded fees and expenses to prevailing defendants. Monkelis, 827 F.2d 935 (awarding attorneys' fees to defendant in ERISA action where former employee failed to set forth any specific facts to support his claim that he was terminated to prevent his pension from vesting, employee's claim was time barred and suit was basically a rehash of same facts that had been found against former employee in state proceeding); Vintilla v. U.S. Steel Corp. Plan, 642 F. Supp. 295 (W.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir. 1987)(holding that employer was entitled to award of attorneys' fees and costs where controlling precedent was strongly against plaintiffs' ERISA claim, continued litigation was highly speculative, and action represented attempt to receive the same benefits twice). However, upon consideration of the Ursic factors, this Court finds that this Defendant is not entitled to a fee award.

A. Plaintiffs' Bad Faith and Culpability and the Relative Merits of the Parties' Positions

The Court first considers the first and fifth Ursic factors, Srein's "culpability or bad faith" and the "relative merits of the parties' positions." The Third Circuit has emphasized that bad faith does not require that the losing party acted with a sinister purpose or motive. McPherson v. Employees' Pension Plan of Am. Re-Ins. Co., Inc., 33 F.3d 253, 256 (3d Cir. 1994). Rather, the pursuit of a meritless position can support a finding of culpability. See, McPherson, 33 F.3d at 256-258; Monkelis, 827 F.2d at 936; Vintilla, 642 F. Supp. at 296-97. This Court finds that these factors do not weigh in favor of an award.

Defendant first argues that Plaintiffs acted with culpability by their taking the position that Frankford was a fiduciary regardless of the fact that the Srein Plan specified that Srein retained full and absolute discretion for all decisions regarding the investment and deployment of

the plan assets. Although this Court found that Frankford was not an ERISA fiduciary and thus not liable to Srein, this finding against Plaintiffs does not support an award of fees as "a losing party is not culpable merely because it has taken a position that did not prevail in litigation." McPherson, 33 F.3d at 257. Further, as this Court discussed in full in its opinion in this matter, since ERISA "defines fiduciary not in terms of formal trusteeship, but in functional terms of control and authority over the plan" a trustee's actual exercise of authority or control could raise fiduciary responsibility thus expanding the universe of persons subject to fiduciary duties. Mertens v. Hewitt Assocs., 508 U.S. 248 (1993). Therefore, Plaintiffs' litigation was not without merit. Defendant also purports to find evidence of Plaintiffs' culpability based upon a colloquy which took place between the Court and Srein in a different case where Srein and Frankford successfully sued third parties. This argument lacks merit as the events which took place in that case are not relevant to this Court's evaluation of a fee award in this case. Accordingly, this Court finds that Plaintiffs' pursuit of its claims were with merit and, although this Court ultimately rejected Plaintiffs' argument, there is no evidence of culpability or any sinister or ulterior motive.

B. The Ability of the Offending Party to Satisfy an Award of Attorney's Fees

As to the second Ursic factor, the Defendant has stated without any evidentiary support that Srein is a multi-millionaire and therefore able to pay the satisfy a fee award. Without more, this Court cannot conclude whether or not Plaintiffs are able to satisfy the Defendant's estimated fees of $140,000.00.

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C. The Deterrent Effect of an Award of Attorney's Fees Against the Offending Party.

This Court finds that a fee award would not act as a deterrent in the case *sub judice*. First of all, as stated previously, Plaintiffs' position that Frankford was a fiduciary to the Srein Plan was not speculative or without merit. Further, this Court rejects Defendant's argument that Srein, as the sole beneficiary of the Srein Plan, elected not to sue Srein as fiduciary and thus his actions went against the goals of ERISA. Therefore, since this Court would not deter Plaintiffs from bringing a claim with merit against a trustee, this Court finds that this factor weighs against a fee award.

D. The Benefit Conferred on Members of the Pension Plan as a Whole

Defendant concedes that the fourth Ursic factor does not apply to this case since Srein did not bring an action against an ERISA plan itself as Srein is the sole member of the Srein Plan. Therefore, this factor is not pertinent and will not be considered.

III. CONCLUSION

For all of the foregoing reasons, this Court finds that the Ursic factors weigh against a fee award.

An appropriate Order follows.

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ORDER

AND NOW, this day of November, 2001, upon consideration of Defendant's Motion for Attorney's Fees (Dkt. No. 52), and any Responses thereto, it is hereby ORDERED that said motion is DENIED.

BY THE COURT:

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ROBERT F. KELLY, Sr. J.